SUPREME COURT, U. S.

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No. 381

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1961

JOHN C. ABBOTT,

Petitioner,

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

REPLY OF PETITIONER TO BRIEF FOR THE UNITED STATES IN OPPOSITION

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Reynolds' Petition

Respondent brings in as germane to this Petition (p. 3) this Honorable Court's failure to grant certiorari in *Reynolds v. United States*, 125 C. Cls. 108, certiorari denied, 346 U.S. 826, notwithstanding that, as stated by Stern and Gressman at page 132-133 Supreme Court Practice—

> "A simple order denying a petition for a writ of certiorari is not designed to reflect the court's views

> either as to the merits of the case or as to its jurisdiction to hear the matter. The court has frequently reiterated that 'the denial of a writ of certiorari imports no expression upon the merits of the case, as the bar has been told many times.' Hence a denial *is not a precedent for like action in a similar case;* nor is it authority which can be properly cited in support of any proposition of law." (*Italics* supplied).

Reynolds' basic contention was that, regardless of congressional intention in 1942, failure to repeal paragraph 4 of Section 15 of the Pay Readjustment Act in connection with enactment of a 1949 Retirement Act showed that Congress intended in 1949 that paragraph 4 should apply to reserve officers. Rejection of this conclusion was the basic reason for Reynolds' petition for certiorari, which was not granted.

The Court of Claims reviewed at length Reynolds' contention in the light of the material in his brief—in contrast with its action in the present case. The court's opinion dealing with the history of the 1949 Act (125 Ct. Cls. at 112-114) is incorrectly cited by Respondent (p. 4, n. 2) as "The history and background of the 1942 act." The court stated in *Reynolds* (125 Ct. Cls. at 114) "Re-enacted sections of a statute must be given the same meaning they had in the same statute unless a contrary intention is plainly manifest * * *" with which Petitioner Abbott agrees. Thus Reynolds' petition was on an essentially different basis than is the present petition. Petitioner Abbott's contention is based solely on refusal of the court to consider new material and to follow proper interpretative rules in arriving at the intent of Congress in 1942.

Bills and Congressional Intent

Respondent states (p. 4, n. 2):

> "Since the *Berry* and *Reynolds* decisions, measures to amend Section 15 to include retired reserve officers have uniformly failed of passage. See S. 2448, 82nd Congress; S. 1330, 83rd Congress; * * * S. 1085 * * * H.R. 689 * * * 85th Congress * * *" etc.

The first bill, S. 2448, *supra*, was introduced *before* the *Berry* decision and the second, S. 1330 *supra*, *before* the *Reynolds* decision. Respondent did not and could not, point to any action, or even hearing on any bill cited.

It would seem axiomatic that even enactment of positive legislation by a later Congress in no way affects the correctness and soundness of a court's decision (such as occurred, for example, after the *Silk* and *Gregoran* cases, 331 U.S. 704). Obviously mere inaction by a later congress after mere introduction of bills, has no significance in evaluating the correctness and soundness of *Berry*, *supra*.

Certainly as germane to the issue as is respondent's reference to these bills, is the purpose, basis and background of the bills themselves as evidenced by their authors. For example, in respect of S. 1085, *supra*, its author, Senator Sparkman, states (103 Cong. Rec., 85th Cong., p. 3491):

> "its purpose is not to enact a new law or to extend the provisions of an existing law, but is to affirm the long-standing policy of Congress to treat reservists the same as regulars by clarifying paragraph 4, Section 15 of the Pay Readjustment Act of 1942 so as to insure its correct interpretation by the affected Governmental agencies * * *

> "This clarification is necessary because Government agencies have held in effect that the words 'any officer' means 'any regular officer,' thus reading into the law a limitation not put there by Congress and depriving reserve officers, otherwise qualified for retirement and clearly included in the words 'any officer' of 75 per cent special retired pay to which they were entitled for the same World War I service."

Congressman Huddleston, the author of H.R. 689, *supra*, made similar remarks and placed in the record evidence of the intent of Congress in 1942 in writing paragraph 4 of Section 15 of the 1942 Pay Readjustment Act (103 Congressional Record, 85th Congress, p. 5303 and App. page A3754).

This evidence included statements of two former senators, both members of the Senate Committee, and one Chairman of its Subcommittee, which wrote the 1942 Pay Readjustment Act. The statement of former Senator Johnson of Colorado in a letter to Congressman Huddleston (p. 5303 *supra*) in part, was:

> "* * * as the Senate sponsor and Chairman of the Subcommittee handling the Pay Readjustment Act of 1942, and as a member of the Senate-House conference which wrote the very paragraph which is the subject of your bill, I say without reservation that it was clearly the understanding and intention of the Senate in 1942 that there be no discrimination between Regular, Reserve or National Guard officers in pay for similar services.
>
> "I think the Comptroller General and the Court of Claims were in error in holding otherwise."

The other statement (App. A 3754 *supra*), that of former Senator Chan Gurney, reads in part:

> "* * * I have carefully read your remarks inserted in the Congressional Record for February 14, 1957 and April 8, 1957, especially noting the reprint of a letter you received from former Senator Edwin C. Johnson of Colorado. I concur in the Senator's remarks that it was the intention of the Committee in the Senate of which I was a member at that time that there should be no discrimination between the Regulars, the Reserve or National Guard officers.
>
> "* * * I do remember vividly the efforts of our Committee and the intent of Congress in equalizing retirement benefits * * *
>
> "* * * We were using every effort to bring back into the service the only experience that was available at the start of World War II, and that experience needed so badly was only had by those officers who had served in World War I.
>
> "* * * in my opinion a contract was made with those who did come back on active duty under the intent of Congress at the time the bill was passed."

Failure to Review New Material

Respondent's statement (p. 4) that—

> "The history and background of the 1942 Act were canvassed by the Court below in *Berry* v. *United States*, 123 C. Cls. 530 and in *Reynolds* v. *United States*, 125 C. Cls. 108[3] * * *
>
> "[3] See '123 C. Cls. at 543-546; 125 C. Cls. at 112-114.'"

must be taken in the light of Petitioner's unchallenged showing (1) of the refusal of the court below to review the basis of its conclusion in *Berry* as to Congress' intent in

1942 in the light of pertinent new analysis and background material by Petitioner, and (2) that *Reynolds* merely cited the *Berry* conclusion as controlling. As mentioned, *supra*, the above cited part of the *Reynolds* opinion discussed history and background of a 1949 act, irrelevant to *Abbott's* petition.

The Interpretation of "Army"

Respondent's statement (p. 5) that—"The construction given the term 'Army' by the Court of Claims in this case is in accord with Congressional intent (see *supra*, n. 4, p. 3) * * *" may be intended to refer to footnote 3 on page 4 of Respondent's brief, as the brief contains no footnote 4, and page 3 does not appear to be germane.

But, as cited in Petitioner's brief, page 8, the basis of its definition of "Army" which the court itself stated (Pet. Br. App. 6) was—

> "The failure of Congress to amend paragraph 4, section 15, * * * in the face of the *Berry* and *Reynolds* decisions, *supra*, creates an inference of congressional approval of the court's determination in those cases which cannot be ignored by this court.
>
> "Therefore, it is our determination that the term 'Army' * * * pertains only to regular officers and not to reserve officers."

Respondent, seemingly in an attempted defense of the Court of Claims' approach in defining "Army" states (p. 5) rather cryptically—

> "But in any event, it is now too late to question that it is the function of the courts, in construing and applying statutes 'to construe the language' so as to give effect to the intent of Congress. *United States* v. *American Trucking Association*, 310 U.S. 534, 542."

This cited opinion certainly offers no defense to the interpretative approach taken by the Court of Claims. It states (p. 543)—

> "There is of course no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the legislation. In such cases we have followed their plain meaning. When that meaning has led to absurd or futile results, however, this court has looked beyond the words to the purpose of the Act. Frequently, however, even when the plain meaning did not produce absurd results but merely an unreasonable one 'plainly at variance with the policy of the legislation as a whole,' this Court has followed that purpose rather than the literal words."

It is submitted that neither absurdity, futility nor variance with policy was found, and that the opinion below failed to reach its conclusions in conformity with the opinions cited by respondent.

Reasons for Certiorari

Respondent's brief is principally significant for what it does *not* contest, i.e.—

1. That the opinion below shows no circumstances to justify ascribing an intent on the part of Congress, despite its plain language, to exclude reserve officers from the scope of Paragraph 4 of Section 15 of the Pay Readjustment Act of 1942.

2. That the Court of Claims refused to consider important background material submitted by Petitioner, and not previously before the court, and while paying lip service to

the plain language rule, failed to apply it according to the rules laid down by this Honorable Court.

3. That decision by this Honorable Court of the broad question here raised would (a) provide the court below needed guidance in the basic rules of statutory interpretation, (b) dispose of a large volume of similar claims, (c) end the uncertainty in the Congress as to legislation, if any, needed, and (d) correct the interpretative doctrine of the opinion below—which is particularly important to federal civilian and military personnel as the Court of Claims is their sole forum for their pay claims, subject only to the jurisdiction of this Honorable Court.

Conclusion

For the foregoing reasons and others set out in the petition, it is respectfully submitted that the petition should be granted.

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